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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ELISHA EDWARDS,

Defendant and Appellant.

C071257

(Super. Ct. No. 12F02732)

Defendant Elisha Edwards pleaded no contest to possession of heroin and was placed on probation.

On appeal, he contends the trial court erred in ordering him to pay a \$25 urinalysis fee without making any finding regarding his ability to pay as required by Penal Code section 1203.1ab (undesignated statutory references are to the Penal Code), and there is no substantial evidence to support a finding of his ability to pay. In the interest of judicial economy, we shall strike the fee and direct that the order of probation be modified accordingly. In all other respects the judgment shall be affirmed.

BACKGROUND

At sentencing, defense counsel objected to the imposition of “non-mandatory fines and fees,” the “laboratory fees and penalty assessments and DNA” and the \$25 urinalysis fee, because they can properly be imposed only if defendant has an ability to pay; defendant does not have such ability, counsel asserted, because he “is on SSI” (Social Security’s Supplemental Security Income). The court declined to impose several fines “based upon inability to pay,” but imposed the \$25 drug testing urinalysis fee.

While this appeal was pending, defendant asked the trial court to strike its imposition of a \$100 drug treatment placement program fee and the \$25 drug urinalysis testing fee. The minute order reflecting the trial court’s response indicates it ordered the \$100 drug treatment placement program fee stricken from the probation order, but “[t]he \$25 urinalysis testing fee remains imposed. The defendant is entitled to a hearing seeking modification of fees based on inability to pay.”

DISCUSSION

Defendant contends the trial court erred in imposing the urinalysis testing fee because there is insufficient evidence in the record to show he has any ability to pay. He asks that we strike the fee.

The trial court did not identify the statutory basis of its imposition of the \$25 urinalysis testing fee. We presume it intended to impose the fee under section 1203.1ab, which states that, upon conviction for unlawful possession of a controlled substance and probation is granted, the court “shall require as a condition of probation that the defendant shall . . . submit to drug and substance abuse testing” and “[i]f the defendant is required to submit to testing and has the financial ability to pay all or part of the costs associated with that testing, the court shall order the defendant to pay a reasonable fee” A determination that a defendant has the ability to pay is thus a prerequisite for

entry of an order for payment of “all or part of the costs” associated with routine substance abuse testing as a condition of probation.

An order for the payment of a fee for which a finding of ability to pay is a prerequisite cannot be upheld on review unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.)

Section 1203.1ab does not define “ability to pay,” but other, analogous statutes define it as requiring the trial court to consider defendant’s present financial position, his reasonably discernible future financial position, the likelihood that the defendant can obtain employment in the reasonably near future, and any other factor which may bear upon the defendant’s financial capability. (E.g., § 1203.1b, subd. (e) [ability to reimburse probation costs]; § 1203.1c, subd. (b) [ability to reimburse incarceration costs]; § 987.8, subdivision (g)(2) [ability to reimburse attorney fees].)

Here, the court’s order that defendant pay a \$25 drug testing urinalysis fee was not supported by substantial evidence of defendant’s ability to pay any amount. The trial court did not conduct an on-the-record hearing to consider the issue, and the only fact in the record is defense counsel’s statement at sentencing that defendant receives SSI payments. The record contains no other evidence of defendant’s income, assets, or reasonably discernible future financial position, or any other factor bearing on his ability to pay the fee. In his brief on appeal, defendant represents that the maximum federal SSI monthly payment amount is \$698, and the mandatory fines otherwise imposed in this case account “for almost an entire month’s SSI” benefits.

We disagree with the People that this appeal should be dismissed as moot because defendant has “already received the relief he seeks,” inasmuch as the trial court has entered an order allowing him a hearing on whether he has the ability to pay the urinalysis fee. Defendant has not obtained the relief he requested--elimination of the fee--and dismissing this case as moot so that defendant may “make a further request of the

court to schedule” a hearing on his ability to pay, as the People suggest, is not appropriate.

Nor, under the circumstances, shall we remand for the trial court to determine defendant’s ability to pay the \$25 drug testing urinalysis fee, in light of defense counsel’s indication that defendant was disabled for purposes of receiving SSI benefits, in which event defendant has little “reasonably discernible future financial position” to pay the fee, or an ability to soon obtain employment to enable him to pay it. Instead, we shall strike the attorney fee order without remand in the interest of judicial economy. (Cf. *People v. Walker* (1991) 54 Cal.3d 1013, 1029, overruled on other grounds by *People v. Villalobos* (2012) 54 Cal.4th 177, 183 [judicial economy warranted modifying judgment on review to reduce restitution fine to statutory minimum rather than remand for determination of appropriate amount of fine]; *People v. Taylor* (2004) 118 Cal.App.4th 454, 456.)

DISPOSITION

The order directing defendant to pay a \$25 urinalysis testing fee is stricken. The clerk of the superior court is also directed to correct the minutes of the April 19, 2012, and September 27, 2012, hearings to reflect that the orders directing defendant to pay a \$25 urinalysis testing fee has been stricken. The judgment is otherwise affirmed.

HULL, Acting P. J.

We concur:

MURRAY, J.

DUARTE, J.